Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-27–04 OF 2018(S)
TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ (MALAYA), NALLINI PATHMANTHAN FCJ AND RHODZARIAH BUJANG JCA
17 FEBRUARY 2020

Equity — Assignment — Absolute assignment of right to receive payment — Borrower secured loan from bank by absolutely assigning to bank proceeds that borrower would receive from sale of goods to third party — Third party notified of assignment consented to same and agreed to pay monies for purchase of goods directly into special account created by borrower that bank could access — Whether bank became legal and beneficial owner over all monies that were paid into special account — Whether bank became legal and beneficial owner over all monies that were paid into special account — Whether subsequent creditor of borrower who was also paid out of the special account could not defeat bank's interest by claiming bank held the monies in the special account on trust for the creditor — Civil Law Act 1956 s 4(3)

The appellant ('the bank') had loaned RM85m to a company named Swakaya Sdn Bhd ('Swakaya') to enable it to fulfill a contract to supply diesel fuel to the Sabah Electricity Board ('SESB') for the latter's power stations ('the SESB contract'). To secure the loan, Swakaya had absolutely assigned to the bank all the proceeds it would receive from the SESB contract. Swakaya gave written notice of the assignment to SESB, explained the reason for the assignment, and instructed SESB to remit all payments under the SESB contract to a project account ('the first project account') which the bank could access to withdraw funds towards settlement of the loan. SESB acknowledged receipt of the notice of assignment and agreed to comply with the payment arrangement. Swakaya, meanwhile, entered into a contract with the respondent ('Petron') for the latter to supply diesel fuel to Swakaya. This was so that Swakaya could in turn supply the fuel under the SESB contract. Petron was to be paid out of the first project account. Problems started some months later when the first project account was frozen by the Malaysian Anti-Corruption Commission ('MACC') under the Money Laundering Act 2001. Since the bank could no longer access the account, Swakaya opened a second project account which the bank could access and into which SESB was required to pay all future payments in respect of the SESB contract. Since Swakaya itself could not withdraw funds from the first project account to pay Petron for its supplies, Swakaya and Petron agreed that Petron would deliver the supplies directly to SESB at Swakaya's behest.

Swakaya later used funds in the second project account to pay Petron for the fuel supplied to SESB but when the amount it owed Petron reached the figure of RM24,835,281.62 ('the outstanding sum'), Petron sued Swakaya to recover the amount and also sued the bank in the same action for 'wrongfully' withdrawing the outstanding sum from the second project account towards settlement of its loan to Swakaya. Petron contended that the monies in the second project account were meant for payments to Petron and the bank could not appropriate the same and convert it for its own use. Petron contended that the bank held the outstanding sum as trustee/constructive trustee for Petron and should return the monies. The High Court agreed with Petron, allowed its claim against the defendants and ordered the bank to return the outstanding sum. The Court of Appeal ('COA') concurred with the High Court and dismissed the bank's appeal holding that the outstanding sum was meant to be payment for Petron's sale of diesel fuel to SESB at Swakaya's behest and was never meant to be payment towards settlement of Swakaya's loan with the bank. The Federal Court granted the bank leave to appeal against the COA's decision on the question 'Whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on 'trust' and/or 'constructive trust' by a third party claiming to have a beneficial interest over the same chose in action'.

Held, unanimously answering the leave question in the negative, allowing the appeal, setting aside the COA's decision and dismissing Petron's claim against the bank:

(1) The bank obtained and enjoyed a valid and enforceable absolute assignment which complied with s 4(3) of the Civil Law Act 1956. The effect of the absolute assignment under the law was to transfer Swakaya's legal and beneficial interest in the SESB contract proceeds (the chose in action) to the bank. In other words, the bank, and not Swakaya or any other third party, was legally entitled to the contract proceeds as and when they were deposited into the project account and the bank was at all material times fully entitled to use the said proceeds to reduce the loan sums or credit facilities afforded by it to Swakaya (see paras 70 & 109).

(2) Neither the bank nor SESB were privy to Swakaya's arrangement with Petron for Petron to supply the diesel fuel directly to SESB. The 'new arrangement' that Swakaya and Petron entered into had no effect on the absolute assignment that Swakaya had created in favour of the bank earlier in time. Swakaya could not renege from or change that position and the bank did not at any time lose its entitlement to the SESB contract proceeds, by virtue of the absolute assignment, which remained valid binding and enforceable (see paras 81, 83 & 109).

(3) On the facts of the case, there was no basis whatsoever for the application of the common law doctrine of constructive trust nor to impose such a

trust on the outstanding sum. Petron had no legal or equitable interest in the outstanding sum. All it had was a right of recovery against Swakaya directly. The 'new arrangement' and Swakaya's endorsing of Petron's claim for the outstanding sum did not create any form of equity in favour of Petron. The imposition of a constructive trust was therefore erroneous (see para 109).

[Bahasa Malaysia summary

Perayu ('bank') telah meminjamkan RM85 juta kepada satu syarikat iaitu Swakaya Sdn Bhd ('Swakaya') untuk membenarkannya untuk memenuhi satu kontrak untuk membekalkan minyak diesel kepada Lembaga Elektrik Sabah ('SESB') untuk stesen janakuasanya ('kontrak SESB'). Untuk mendapatkan pinjaman tersebut, Swakaya telah membuat penyerahan mutlak kepada bank semua hasil yang ia akan terima daripada kontrak SESB. Swakaya memberikan notis bertulis penyerahannya kepada SESB, memberikan penjelasan berkaitan penyerahan tersebut, dan mengarahkan SESB untuk membuat semua pembayaran di bawah Kontrak SESB kepada satu akaun projek ('akaun projek pertama') yang mana bank mempunyai akses untuk mengeluarkan wang terhadap penyelesaian pinjaman tersebut. SESB mengakui penerimaan notis penyerahan dan bersetuju untuk mematuhi dengan persetujuan pembayaran. Manakala, Swakaya telah memasukki satu kontrak dengan responden ('Petron') untuk Petron membekalkan minyak Diesel kepada Swakaya. Ini adalah supaya Swakaya boleh kemudiannya membekalkan minyak di bawah kontrak SESB. Petron sepatutnya dibayar daripada akaun projek pertama. Masalah muncul beberapa bulan kemudian apabila akaun projek pertama dibekukan oleh pihak Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') di bawah Akta Pencegahan Pengubahan 2001 (AMLA). Memandangkan bank tidak lagi mempunyai akses kepada akaun, Swakaya membuka akaun projek kedua yang mana bank mempunyai akses kepadanya dan SESB diperlukan untuk membuat semua pembayaran akan datang berkaitan dengan kontrak SESB. Memandangkan Swakaya tidak boleh mengeluarkan wang daripada akaun projek pertama untuk membayar Petron untuk bekalnya, Swakaya dan Petron bersetuju bahawa Petron akan membekalkan bekal secara terus kepada SESB atas permintaan Swakaya. Swakaya kemudiannya menggunakan wang dalam akaun projek kedua untuk membayar Petron untuk minyak yang dibekalkan kepada SESB akan tetapi apabila jumlah yang ianya berhutang kepada Petron mencapai jumlah RM24,835,281.62 ('jumlah terhutang'), Petron menyaman Swakaya untuk mendapatkan semula jumlah terhutang dan juga bank dalam tindakan yang sama kerana secara salah mengeluarkan jumlah terhutang daripada akaun projek kedua terhadap penyelesaian pinjamannya kepada Swakaya. Petron mengatakan bahawa wang dalam akaun projek kedua bertujuan untuk pembayaran keapda Petron dan bank tidak boleh menggunakannya dan menukarnya untuk kegunaannya sendiri. Petron mengatakan bahawa bank memegang jumlah terhutang sebagai pemegang amanah/pemegang amanah konstruktif untuk Petron dan sepatutnya

memulangkan wang tersebut. Mahkamah Tinggi bersetuju dengan Petron, dan membenarkan tuntutannya terhadap defendan dan memerintahkan bank untuk memulangkan jumlah terhutang. Mahkamah Rayuan ('MR') bersetuju dengan Mahkamah Tinggi dan menolak rayuan bank memutuskan bahawa jumlah terhutang bertujuan sebagai pembayaran untuk penjualan minyak diesel Petron kepada SESB atas arahan Swakaya dan tidak pernah bertujuan untuk pembayaran terhadap penyelesaian pinjaman Swakaya dengan bank. Mahkamah Persekutuan membenarkan izin bank untuk merayu terhadap keputusan MR atas soalan 'sama ada hak dan kepentingan seorang penerima penyerahan dalam pemilihan tindakan penyerahan mutlak boleh dipatahkan oleh tuntutan yang berasaskan satu amanah/amanah konstruktif oleh pihak ketiga yang mengatakan mempunyai kepentingan benefisial terhadap hak dalam tindakan yang sama'.

Diputuskan, sebulat suara menjawab soalan izin secara negatif, membenarkan rayuan, mengenepikan keputusan MR dan menolak tuntutan Petron terhadap bank:

(1) Bank mempunyai satu penyerahhan hak mutlak yang sah dan boleh dikuatkuasakan yang mematuhi s 4(3) Akta Undang-Undang Sivil 1956. Kesan penyerahan mutlak di bawah undang-undang adalah untuk memindahkan kepentingan benefisial dan undang-undang Swakaya dalam hasil kontrak SESB (hak dalam tindakan) kepada bank. Dalam erti kata lain, bank, dan bukannya Swakaya atau apa-apa pihak ketiga lain, mempunyai hak kepada hasil kontrak dan apabila ianya didepositkan kedalam akaun projek dan bank pada semua masa material berhak untuk mengunakan hasil tersebut untuk mengurangkan jumlah pinjaman atau fasiliti kredit yang diberikannya kepada Swakaya (lihat perengan 70 & 109).

(2) Bank dan SESB tidak mengetahui aturan Swakaya dengan Petron untuk Petron membekalkan minyak diesel secara terus kepada SESB. Aturan baru yang dimasukki Swakaya dan Petron tiada kesan terhadap penyerahan mutlak yang diwujudkan Swakaya yang memihak kepada bank pada mulanya. Swakaya tidak boleh berpaling atau menukar kedudukan dan bank tidak pada bila-bila masa hilang haknya kepada hasil kontrak SESB, melalui penyerahan mutlak, yang kekal sah, mengikat dan boleh dikuatkuasakan (lihat perengan 81, 83 & 109).

(3) Atas fakta kes tiada asas untuk pemakaian doktrin *common law* amanah konstruktif ataupun untuk mewujudkan amanah sedemikian atas jumlah terhutang. Petron tiada kepentingan undang-undang atau ekuiti terhadap jumlah terhutang. Apa yang ia miliki adalah hak untuk mendapatkan semula terhadap Swakaya secara terus. Aturan baru dan pengendorsan Swakaya terhadap tuntutan Petron terhadap jumlah terhutang tidak mewujudkan apa-apa ekuiti yang memihak kepada

Petron. Mewujudkan amanah konstruktif adalah salah (lihat perengan 109).]

Cases referred to

Affin Bank Berhad v ACP Industries Berhad [2014] 1 MLRA 182 (refd)
CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169; [2014] 3 CLJ 1, FC (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b; [1978] 1 LNS 32 (refd)
Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62; [1988] 1 CLJ 164 (refd)
Damai Freight (M) Sdn Bhd v Affin Bank Bhd [2015] 4 MLJ 149; [2015] 4 CLJ 1, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600; [2014] UKSC 41; 2014 GWD 23-437; 2014 SLT 775; [2014] WLR(D) 290; [2014] SCLR 692, SC (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149; [1989] 2 CLJ 101, SC (folld)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Malayawata Steel Berhad v Government of Malaysia & Anor [1980] 2 MLJ 103, PC (refd)
Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457; [2016] 2 CLJ 7171, FC (refd)
Mercantile Bank of London Ltd v Evans [1899] 2 QB 613, CA (refd)
Metzgar v Metzgar 1 Rawle 227, SC (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)
Paragon Finance and Carl Zeiss Stiftung v Herbert Smith & Co [1969] 2 Ch 276, CA (refd)
Paragon Finance plc v DB Thakerar & Co (a firm); Thimbleby & Co (a firm) v Paragon Finance plc and another [1998] Lexis Citation 2873, CA (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh A/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 AMR 2081; [2002] 2 CLJ 621, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (distd)
Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Tudingan Timur Sdn Bhd v Che Mat bin Padali (Civil Appeal No A-02–1613 of 2011) (unreported), CA (distd)

A *Twinsectra Ltd v Yardley And Others* [2002] 2 All ER 377, HL (refd)
UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365; [1996]1 CLJ 379, FC (folld)
B *United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd* [1988] 2 MLJ 297; [1988] 1 LNS 8, SC (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)

C **Legislation referred to**

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Civil Law Act 1956 s 4(3)
D Courts of Judicature Act 1964 s 78(1)

Appeal from: *Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd* [2019] 3 MLJ 360 (Court of Appeal, Putrajaya)

E *Saiful Azian Mokhtar (Jayasuriya Kah & Co) for the appellant.*
Douglas Lind (Delonia Chong with her) (Lind, Willie Wong & Chin) for the respondent.

Nallini Pathmanathan FCJ:

F INTRODUCTION

[1] The primary issue that arises in this appeal is whether:

(a) an absolute assignee under a letter/contract of assignment executed earlier in time; or
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(b) a creditor entitled to payment in respect of goods sold and delivered,

is entitled to monies in a bank account in the name of their common debtor. H The appellant, Sabah Development Bank Bhd ('the bank') is the absolute assignee of all proceeds of monies in the bank account of one Swakaya Sdn Bhd ('Swakaya') by reason of a sum of RM85m loaned to Swakaya, while the respondent, Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) ('Petron') is the creditor, by reason of goods sold and delivered on I behalf of Swakaya to Sabah Electricity Board.

[2] In the courts below it was determined that it was the respondent, Petron that was entitled to the proceeds. This conclusion was premised on the grounds that a constructive trust could be inferred over the subject monies/proceeds

deposited by another entity, namely the Sabah Electricity Board ('SESB') into Swakaya's bank account, as payment to Petron for goods sold and delivered. In other words the constructive trust inferred took priority over the absolute assignment created by the bank earlier in time. The appeal turns on whether this conclusion is correct or flawed.

THE PARTIES IN THE HIGH COURT SUIT

[3] Petron is a company engaged in the business of marketing petroleum and petroleum products. It was the plaintiff in the High Court and is the respondent before us.

[4] The first defendant in the High Court proceedings was Swakaya, the debtor, that borrowed monies from the bank and induced Petron to supply goods to SESB. Swakaya is not a party in the appeal before us. However the actions of Swakaya have far-reaching implications for the other actors in the events which transpired.

[5] The bank was the second defendant in the High Court proceedings and is the appellant before us.

THE SALIENT FACTS

The initial arrangement between SESB, Swakaya and Petron

[6] On *19 December 2012*, SESB awarded Swakaya a contract to supply and deliver diesel fuel to SESB's power stations ('the SESB contract'). The contract sum was RM506,952,888.75.

[7] In order to finance and carry out the SESB contract, Swakaya applied for and was granted two banking facilities by the bank totalling RM85m. Vide the *first letter of offer dated 12 March 2013* Swakaya was granted an initial facility of RM50m on specific terms and conditions. A *second letter of offer dated 1 August 2013* for an additional sum of RM35m was granted on terms as set out in the second letter. Swakaya needed this funding to purchase diesel fuel from various suppliers, including Petron.

[8] As security for the initial RM50m banking facility granted by the bank, Swakaya executed an *assignment of contract proceeds agreement dated 3 April 2013*. Pursuant to this agreement Swakaya assigned absolutely to the bank all the contract proceeds from the SESB contract.

[9] Written *notice of assignment was given by Swakaya to SESB in writing on 20 March 2013*. Swakaya irrevocably instructed SESB to remit all contract

proceeds arising from the SESB contract to a project account with Malayan Banking Bhd, Kota Kinabalu ('first project account'). It was expressly specified that the assignment was given as security for the credit facilities granted to Swakaya by the bank.

[10] *SESB replied on 22 March 2013 acknowledging receipt of the notice of assignment and agreeing to the same.* It further agreed to comply with the instructions on the remittance of funds. In other words SESB agreed to make all payments to the first project account in accordance with the terms of the assignment agreement between the bank and Swakaya.

[11] Security for the repayment of the additional RM35m afforded to Swakaya, came in the form of a *Supplemental assignment of contract proceeds agreement dated 23 August 2013* in favour of the bank. This amounted to a second absolute assignment of all contract proceeds, (ie payments from SESB) to the bank. It reiterated the arrangement between the three parties whereby SESB, the party paying the funds would remit the same directly to the first project account, where the assignee, the bank could draw directly from that account towards repayment of monies owed to it by the assignor, Swakaya.

[12] In summary therefore, as security for the abovementioned facilities, Swakaya absolutely assigned the full contract sum of the SESB contract (RM506,952,888.75) to the bank. Swakaya agreed that the bank could use the proceeds deposited into the first project account towards payment of the outstanding credit facilities.

[13] One of the terms of the contract for the supply of diesel oil between Swakaya and SESB was that Swakaya could not assign the contract or the contract benefits to any other party without the prior written consent of SESB (see cl 11.1 of the General Conditions of the SESB contract). This clause was expressed to not affect any right of Swakaya to assign absolutely, or by way of charge any money due or to become due to it, or which may be payable to Swakaya under the contract. This enabled Swakaya to absolutely assign payments received, to the bank to repay the facilities it had procured.

[14] To this end it is pertinent that the bank's managers and officer were appointed the authorised signatories of the designated first project account, even though the said project account was under Swakaya's name.

[15] On *1 April 2013, Swakaya entered into a contract with its suppliers, one of which was Petron*. Pursuant to this contract, Petron would provide diesel fuel for a period of two years for Swakaya to enable it to fulfil its contract with SESB.

[16] Petron was to be paid out of the first project account.

[17] The arrangement between Swakaya, Petron and SESB commenced in April 2013 and went smoothly at first. However, problems arose due to Swakaya's financial problems, and the arrangement had to be varied.

Swakaya's financial problems

[18] In *October 2013, the first project account* was frozen by the Malaysian Anti-Corruption Commission ('MACC') under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') 2001. Swakaya was denied access to the funds in the said account and was accordingly unable to use the funds in that account to purchase diesel fuel to fulfil its legal obligations under the SESB contract.

[19] To address its inability to now pay for fuel it was required to supply to SESB under the SESB contract, Swakaya requested Petron to supply diesel fuel to SESB directly. In return, Swakaya agreed that SESB could pay Petron directly. *Vide a letter dated 24 October 2013, Swakaya informed SESB of the new arrangement. Swakaya and Petron confirmed this arrangement by a letter dated 15 November 2013. This letter was signed by Swakaya and Petron, but not by SESB.*

[20] This 'new arrangement' was organised by Swakaya notwithstanding its express knowledge and execution of the absolute assignments it had effected in favour of the bank. The terms of the assignment agreements were such that all monies paid by SESB, including the monies paid into the second project account were assigned to the bank for the repayment of credit facilities. Any payment directly to a supplier, such as Petron, would contravene the terms of the absolute assignment agreements between the bank and Swakaya.

[21] As the bank was also unable to withdraw monies (owed to it) from the first project account, Swakaya agreed to open a second project account, this time with CIMB Bank Bhd ('the second project account'). *The second project account was opened in November 2013.*

[22] Similarly it was requested that all contract proceeds from the SESB contract be remitted to the second project account. *The bank vide letter dated 20 November 2013 informed SESB of the new project account at CIMB bank, ie the existence of the second project account. The bank requested that all contract proceeds from the SESB contract be remitted to the second project account.* This was entirely in accordance with the assignments made in favour of the bank by the debtor, Swakaya as security for the credit facilities afforded by the bank.

[23] On *18 February 2014* Petron wrote to SESB and copied the letter to the bank, seeking that Swakaya and the bank remit monies for diesel oil supplied to Petron.

[24] By a *second notice (undated) issued by Swakaya to SESB, Swakaya notified SESB of the assignment of all contract proceeds in favour of the bank*, and irrevocably instructed SESB to remit all contract proceeds from the SESB contract to the second project account. *This was acknowledged by SESB on 28 February 2014*. Again it was expressly reiterated that the assignment was security for the credit facilities afforded to Swakaya.

[25] In the month of November 2013, Petron had supplied diesel fuel to SESB directly, for which full payment of RM12,977,480.11 was remitted to Petron from the second project account. Later, the bank explained to the court that the remittance for the supplies in November 2013 were made by Swakaya to Petron without the bank's knowledge, as this occurred before the assignment of the CIMB project account to the bank was complete, and prior to the appointment of the bank's employees as signatories to the second project account. It is not in dispute that the manager and officer of the bank were only appointed as authorised signatories for second project account in March 2014.

[26] In other words, during the period between the freezing of the first project account and prior to the setting up of the second project account, monies were paid out to Petron directly instead of the bank.

[27] The value of the diesel fuel supplied under the 'new arrangement' between Swakaya and Petron amounted to RM50,094,713.79. Petron was paid a portion of that sum, namely RM26,027,121.95 directly. The sum of RM24,835,281.62 being the balance sum claimed by Petron remained outstanding. This was because after receiving the letter dated 20 November 2013, no direct payment was made to Petron from the second project account, as had been held out by Swakaya to Petron under the 'new arrangement'. Instead, SESB followed the bank's instructions in the letter dated 20 November 2013 and deposited payment into the second project account.

[28] Petron sued Swakaya to recover the balance sum. It also sued the bank for allegedly 'wrongfully' withdrawing the balance sum from the second project account to settle part of the loans taken by Swakaya from the bank.

THE DECISION OF THE HIGH COURT

[29] In the High Court, Petron as plaintiff brought a claim against Swakaya for the outstanding sum of RM24,835,281.62 due and owing to it for the supply of diesel oil at Swakaya's behest to SESB. Its claim against the bank is

premised on the basis that the bank holds the monies paid by SESB in its favour as 'trustee' or 'constructive trustee' and is liable to Petron for the same.

[30] The learned judicial commissioner ('JC') allowed Petron's claim against the defendants and ordered the bank to return the monies received by the bank on the grounds of the subsistence of a *trust or constructive trust in favour of Petron*. In brief, the trial judge accepted Petron's contentions that by withdrawing the sum of RM24,835,281.62, the bank had unjustly enriched itself to offset the amount owed by Swakaya. In addition, the learned JC found that there was a *constructive trust* over the monies since the bank knew that the monies were supposed to be remitted to Petron.

[31] The bank appealed against this decision to the Court of Appeal. Swakaya did not.

THE DECISION OF THE COURT OF APPEAL

[32] The Court of Appeal affirmed the decision of the High Court and dismissed the bank's appeal with costs. It took the view that the issue was not whether SESB had agreed to pay Petron directly for the diesel fuel supplied, but whether it was conscionable for the bank to claim the monies as its own and to use it for its own benefit, when SESB's payment into the second project account was meant for payment to Petron.

[33] The crux of the decision of the Court of Appeal was that the sum of RM24,835,281.62 was meant as payment for Petron's sale of diesel fuel to SESB. It was never meant as repayment of Swakaya's loan taken from the bank. There was no evidence that Petron consented to the money being utilised to reduce Swakaya's loan. Hence the court held that the bank could not unjustly enrich itself by utilising the monies for its own benefit.

LEAVE TO APPEAL TO THE FEDERAL COURT

[34] Dissatisfied with the decision of the Court of Appeal, the bank applied for leave to appeal to the Federal Court. Leave to appeal against the decision of the Court of Appeal was obtained on 12 April 2018 on the following question of law:

> *Whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on 'trust' and / or 'constructive trust' by a third party who claimed to have a beneficial interest over the same chose in action.*

[35] We heard the appeal on 25 June 2019 and reserved our decision. We now deliver our decision and reasoning below.

A OUR DECISION

[36] As stated at the outset, the primary issue for determination here is which of the two creditors who claim competing entitlement, should prevail:

B (a) the bank in whose favour Swakaya created an absolute assignment earlier in time over the proceeds of sales of the SESB contract (between SESB and Swakaya for the supply of diesel oil); or

(b) Petron, who asserts a right to those proceeds in respect of a debt owed to it by Swakaya for diesel oil supplied directly to SESB pursuant to its arrangement with Swakaya vide letter dated 15 November 2013?

[37] It is first necessary to examine and comprehend the legal reasoning and application of the law by the Court of Appeal (and thereby the High Court) to D ascertain whether their decisions are correct or erroneous in any respect.

[38] It is trite that an appellate court will not, generally speaking, intervene unless the lower court is shown to be plainly wrong in arriving at its judicial decision (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* E [2005] 2 MLJ 1; *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453; *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Thomas v Thomas* [1947] AC 484 and the recent English Supreme Court case of *Henderson v* F *Foxworth Investments Ltd and another* [2014] 1 WLR 2600; [2014] UKSC 41; 2014 GWD 23-437; 2014 SLT 775; [2014] WLR(D) 290; 2014 SCLR 692, UKSC 2013/0083.)

The legal rationale of the High Court

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[39] The trial judge relied on *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 ('Takako Sakao') as well as *Paragon Finance plc v DB Thakerar & Co (a firm); Thimbleby & Co (a firm) v Paragon Finance plc and* H *another* [1998] Lexis Citation 2873 ('Paragon Finance') to conclude that the fact pattern of the instant appeal 'falls squarely' within the parameters of a constructive trust. His Lordship did not explain precisely where or how such similarity arose. He held simply that he agreed with Petron that 'in the circumstances of the case' the bank had received the sum claimed from SESB as I a constructive trustee for the benefit of Petron. Accordingly it was the duty of the bank to return the monies to Petron and not keep it for itself. The trial judge went on to conclude that if the bank did not do so, it would be unjustly enriched. Accordingly it was a fit case for the court to impose a constructive trust seemingly 'to satisfy the demands of justice and good conscience'.

Reference was made to several other cases which simply set out correctly the definition of a constructive trust.

[40] With the greatest of respect, the judgment of the High Court, which comprises largely of citations for the definition of constructive trusts, does not in any part of the judgment:

(a) analyse the chronology of facts;

(b) acknowledge or examine the existence of an absolute assignment in favour of the bank;

(c) consider the effect of such an absolute assignment in relation to Petron's claim;

(d) explain or analyse how a constructive trust arises in the context of the facts here, given the existence of extensive borrowings from the bank by Swakaya which was secured by contracts of assignment of proceeds arising/accruing from the sale of diesel fuel to SESB;

(e) explain how the legal concepts of a constructive trust arise in the context of the various cases cited;

(f) consider whether, if such trust does indeed arise or subsist, the interplay in law between such a trust and a valid absolute assignment;

(g) consider or apply the principles of unjust enrichment within a legal context or the factual background of this case, particularly the existence of a valid, legal, enforceable absolute assignment of the subject proceeds; and

(h) consider the far reaching effects on the banking and construction industries of holding that a constructive trust can arise and defeat an absolute assignment of proceeds created prior to the subsistence of such a trust.

[41] Without the application of accepted legal principles in relation to the law relating to absolute assignments, which comprise a fundamental aspect of banking law, and on which subject there is considerable case law, the judgment cannot, with great respect, be said to be sound. Apart from the absence of accepted basic legal principles, there is a dearth of legal reasoning, which is a fundamental requirement of any judgment of the court. It does not shed light on how the court reached the conclusion, on the facts of this case, that a constructive trust arises.

[42] It is important that judgments, at first instance or otherwise, explain fully the basis for reaching a conclusion both on the facts and the law. This requires the setting out of the salient facts, an appreciation of those facts, a

consideration of the relevant law in respect of the case and the application of the law to those facts resulting in a decision that is reasoned. The fact that there has been an error in the comprehension of the facts, law or applicability of a legal principle may result in a decision that is erroneous, but it would still be a legally reasoned judgment in that the method of thought and argument utilised by the judge when applying legal principles to interactions between persons or entities would be apparent.

[43] In the instant case the legal methodology utilised by the trial judge is stated to be premised on precedent and analogy but the basis on which precedent and analogy have been applied in the cases cited to the particular facts of the case before him, is absent. The similarity of the factual pattern or legal precedent, which comprises the basis to apply this form of legal reasoning, ie precedent and analogy is not articulated.

[44] The case of *Tudingan Timur Sdn Bhd v Che Mat bin Padali* (Civil Appeal No A-02–1613 of 2011) (unreported) is entirely inapplicable on the facts and the law as it involved monies deposited with a third party in the context of a joint venture. The monies were returned and an employee of one of the joint venture companies placed the said monies in his personal bank account. The employee claimed to have passed the monies on to one of the directors of the company. The Court of Appeal found him liable to make good the monies when the plaintiff who was the other partner in the joint venture company sought the return of the monies. It was observed that the employee had 'received the sum ... as a constructive trustee for the benefit of the plaintiff'. This last sentence appears to be the basis on which a constructive trust was found and applied to the facts of the instant appeal.

[45] In similar vein the facts of *Takako Sakao* are simply not comparable, let alone on all fours with the facts of the instant appeal. The application of the principles of law relating to a constructive trust are simply inapplicable in the context of the instant appeal.

[46] The decision of the High Court is flawed.

The decision of the Court of Appeal

[47] The Court of Appeal treated the appeal as one concerning the creation of a constructive trust. The facts of the case were therefore apprehended and dealt with on that basis, namely whether or not the trial judge was correct in his conclusion that the facts of the case warranted the imposition of a constructive trust.

[48] The full factual matrix was set out as were the contentions of respective

counsel. The primary complaint of the bank was that the trial judge had failed to consider the legal effect or the consequences of the subsistence of the assignment of contract proceeds agreement between the bank and Swakaya.

[49] More particularly, emphasis was placed on the evidence at the trial which disclosed that SESB had not expressly agreed to make direct payments to Petron. The Court of Appeal held that this issue was not of paramount importance. What was important was 'whether it was conscionable for SDBB to claim the money as its own and to use it for its own benefit when it was meant as payment to Petron for the diesel fuel that it supplied and delivered to SESB'. (SDBB refers to the bank)

[50] It is apparent from the foregoing that the Court of Appeal viewed the monies in the second project account as being available for the imposition of a constructive trust in favour of Petron's claim. Emphasis was given to the element of 'conscionability' in relation to those funds, on the grounds that the court viewed the monies paid by SESB as having been meant for payment to Petron. Thereafter the sole issue before the court became one of whether or not this was a fit and proper case for the establishment of a constructive trust.

[51] To this end case law in Malaysia, the United Kingdom and the United States of America was considered and applied. In short the Court of Appeal concurred with the trial judge that the balance sum paid by SESB was held by the bank as constructive trustee for the benefit of Petron. Accordingly it was the bank's duty to return the monies to 'its rightful owner', Petron.

[52] In rejecting the submissions of the bank that it was entitled to the monies by reason of the assignment of contract proceeds agreement entered into with it, as security for the credit facilities afforded to Swakaya, the Court of Appeal held that this argument was 'structurally flawed' as it ignored the 'simple truth' that the balance sum was meant as payment for Petron's sale of the diesel fuel to SESB and was never meant as repayment for Swakaya's loan with SSDB or any other purpose.

[53] Further, the court found that there was no evidence that Petron had consented to the monies being utilised for reducing Swakaya's loan totaling RM85m. It was concluded that it was wrong to say that Petron had lost its right to the monies merely because Swakaya had assigned the contract proceeds absolutely to SESB. The court went further to state that the bank had behaved unconscionably in insisting that it was entitled to the said monies 'despite knowing that Petron was the beneficial owner'. This in turn was because the court found that the second project account was for the purposes of making payment to Petron for the diesel supplied and delivered to SESB. Therefore

Petron it concluded, had 'better rights over the money' as it was specifically for the purposes of payment to Petron.

[54] With the greatest of respect the Court of Appeal erred in its findings and conclusions for the following reasons:

(a) it failed to comprehend the effect of the contract for the assignment of all contract proceeds of the SESB contract with Swakaya;

(b) it failed to comprehend the purpose and effect of an absolute assignment at law;

(c) it failed to appreciate that the absolute assignment accorded the bank entitlement to, and priority over all contract proceeds, whether housed in the first or second finance project account on the basis of the contract for the assignment of proceeds;

(d) it failed to comprehend and therefore did not consider the effect of such a finding on the banking industry;

(e) it erroneously concluded that the second project finance account was for the purposes of enabling Petron to be paid out of that account, without realising that the primary purpose of the project accounts was to separate and house the contract proceeds of the SESB contract for the purposes of repaying the loan afforded by the bank;

(f) it failed to appreciate that at all material times the assignment continued to subsist and was valid and enforceable as security for the loan afforded by the bank;

(g) it erred in finding that this was an appropriate case for the imposition of a constructive trust in that the bank had never at any point of time displayed deceptive conduct or dishonesty, nor taken monies not lawfully owing to it;

(h) it erred in finding that the monies in the second finance project were 'meant as payment to Petron' for diesel fuel that it supplied and delivered to SESB. Accordingly the factual and legal basis for finding a constructive trust never subsisted; and

(i) it failed to appreciate that in *Takako Sakao*'s case the circumstances were such that it was unconscionable for the owner of the property to assert his beneficial interest and deny the beneficial interest of another. In the instant case the bank was lawfully asserting its prior legal right and entitlement to the monies in the second project account by way of priority and security, thus precluding the imposition of a constructive trust.

THE EFFECT OF THE ABSOLUTE ASSIGNMENT GIVEN BY SWAKAYA TO THE BANK

The clauses in the contracts between Swakaya and the bank

[55] It will be recalled that Swakaya provided security for the credit facilities of RM85m it procured from the bank. This took the form of the assignment of all proceeds received by Swakaya from the SESB contract. The provisions of the assignment of contract proceeds agreement dated 3 April 2013 expressly stipulates in section 3.1 that:

> ... the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled ...

[56] A similar provision is found in the supplemental assignment of contract proceeds dated 23 August 2013. This is not in dispute.

Section 4(3) of the Civil Law Act 1956

[57] The absolute assignments thus created are legally valid as the requisite written notices of assignment were served on SESB. Section 4(3) of the Civil Law Act 1956 provides:

> (3) *Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor,* trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, *shall be,* and be deemed to have been, *effectual in law,* subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, *to pass and transfer the legal right to the debt or chose in action, from the date of the notice,* and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. (Emphasis added.)

Definitions

[58] 'Assignment' generally means the transfer of existing proprietary rights, future rights, property, debt or other contractual rights by one person to another person. In the instant appeal it refers to the transfer of rights or entitlement to the contract proceeds received by the debtor, Swakaya to the bank.

[59] 'Assignee' is the new creditor, a lender or a buyer of receivables, transferee or holder of the security. In the instant appeal, it refers to the bank.

[60] 'Assignor' is the creditor in the original contract giving rise to the assigned receivables. The assignor is either a borrower (or a third party) who transfers or creates security over a receivable. Here it is Swakaya.

[61] 'Chose in action' is the real and personal right of property which can only be claimed or enforced by action, and not by the taking of physical possession, because it is not tangible.

[62] 'Obligor' is the debtor in the original contract from which the assigned receivables arise, the person who owes payment of the receivable to the assignor. Here it is SESB who makes payment to Swakaya for diesel oil supplied under the SESB contract.

The effect of an absolute assignment

[63] The effect of an absolute assignment has been considered in numerous cases. In *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1 the Federal Court explained in full how s 4(3) was to be construed, as well its effect and consequences.

[64] The definition to be accorded to a 'chose in action' as explained in *Mozley & Whiteley's Law Dictionary* (10th Ed) was utilised. It is defined as 'a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action'. It is therefore clear that the monies which Swakaya was entitled to receive from SESB under the SESB contract for the supply of diesel oil amounts to a 'chose in action'. It is indeed something to which the bank, as assignee had no present right of enjoyment, but by reason of the assignment was entitled to a right to recover those monies by action.

Were the assignments accorded by Swakaya absolute assignments or by way of charge or security only?

[65] The next issue considered was whether the contract of assignment did indeed absolutely assign such a chose in action or merely secured it.

[66] Whether or not an assignment is absolute for the purposes of the statutory regime is ultimately an issue of construction (see *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613).

[67] The case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149; [1989] 2 CLJ 101 (SC) is authority for the proposition that the use of the words 'absolutely assigns' demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of charge only.

[68] The bank here holds an absolute assignment, consistent with the use of the words 'assigns absolutely' as employed in section 3.1 of the contract for the assignment of proceeds (see also *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; *United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd* [1988] 2 MLJ 297; [1988] 1 LNS 8; *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62; [1988] 1 CLJ 164; *Phileoallied Bank (M) Bhd v Bupinder Singh A/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 AMR 2081; [2002] 2 CLJ 621 (FC).

[69] It is apparent from the use of the words 'assigns absolutely' in the clauses specified in the contract for the assignment of proceeds in the instant case, that the assignment of the chose in action, ie the right to the proceeds paid into the project accounts, is an absolute assignment and not by way of charge only.

[70] In other words the legal entitlement to the contract proceeds, as and when they are deposited in the project accounts (albeit the first or second project account) is that of the bank and not Swakaya or any other third party. The effect and consequence of the absolute assignment is therefore that ownership or entitlement to recover and receive the proceeds paid in by SESB was transferred from Swakaya to the bank as early as 3 April 2013.

[71] It is evident from the statute itself that the effect of an assignment of a 'chose in action' (ie the monies paid by SESB to Swakaya under the SESB contract for the supply of diesel oil from Swakaya to the bank), is to pass and transfer the legal right to that chose in action to the bank, as assignee, from the date of notice being accorded to the obligator, ie SESB. This means that as of 3 April 2013, the bank enjoyed legal title to the monies in the project account. That is the effect of the absolute assignment (see also *Affin Bank Berhad v ACP Industries Berhad* [2014] 1 MLRA 182).

Conditions for the subsistence of a valid absolute assignment

[72] The case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996]1 CLJ 379, a decision of this court, sets out the conditions necessary for effecting an absolute legal assignment under s 4 (3) of the Civil Law Act 1956. The conditions are:

(a) the 'debt or other chose in action' must be one that is existing;

(b) the assignment must be in writing under the hand of the assignor;

(c) the assignment must be absolute and not by way of charge only; and

(d) there must be express written notice of the assignment to the obligor.

[73] The conditions specified above are met in the instant case because the debt or other chose in action was subsisting, namely a right (on the part of the bank) to receive, own or recover the contract proceeds under the SESB contract. At the time of the assignment by Swakaya to the bank (3 April 2013), such a debt or right to the debt subsisted as the SESB contract had been executed between Swakaya and SESB (19 December 2012).

[74] As stated earlier the subject matter of the assignment was a chose in action namely the right to receipt of, and recovery (if witheld) of the contract proceeds of the SESB contract (it is significant to note that the assignment was binding on SESB as well, in that if it made payment (after the assignment came into effect) directly to Swakaya or a third party without the consent of the bank it might well open itself to liability to repay the bank (see *Malayawata Steel Berhad v Government of Malaysia & Anor* [1980] 2 MLJ 103).

[75] The assignment was in writing, assigned absolutely the proceeds of the SESB contract directly to the bank and notice of such assignment was properly given to SESB.

[76] It is therefore our conclusion that, after construing the relevant contracts of assignment as a whole, Swakaya had created, in favour of the bank, an absolute assignment not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956. The assignment dated 3 April 2013 and 23 August 2013 was absolute as Swakaya (assignor) intended to transfer its legal rights and beneficial interest over the SESB contract proceeds irrevocably to the bank (assignee). The assignment was unconditional and did not introduce uncertainty to the obligor, as SESB had been given express notice to make payment to the bank.

[77] From the contemporaneous documents in the appeal records, express notices of assignment of the contract proceeds had been given by Swakaya (assignor) and the bank (assignee) to SESB (obligor) on 20 March 2013, 20 November 2013 and February 2014. By these notices SESB was notified that Swakaya had obtained loan facilities from the bank and requested that all contract proceeds due under the contract be assigned and remitted directly into initially the first project account, later the second project account for the bank.

[78] SESB's responses in writing dated 22 March 2013 and 28 February 2014 (for the second project finance account) proved that it expressly consented to the assignment in writing.

[79] The effect of such consent is comprehensively set out in the old case of *Metzgar v Metzgar* 1 Rawle 227 from the United States of America, where Gibson, CJ agreed that 'notice puts an end to all privity between the assignor

and obligor, and the assignee becomes the owner of the bond, subject to any existing equity against the obligee. After the notice of the assignment, a new contract arises between the obligor and the assignee, who holds a chose in action no more negotiable than it was in the hands of the obligee'.

[80] For these reasons the assignment of the contract proceeds under the SESB contract to the bank is clear beyond dispute. The effect was to transfer ownership of all future funds deposited in the designated accounts to the bank. As the monies were periodically deposited ownership of the funds was with the bank, over and above other interests, including that of Petron, unless a prior equity subsisted, which is not the case here.

Did the freezing of the first project account and the creation of the second project account affect or alter the validity of the absolute assignment such that Petron acquired any greater entitlement than the bank to the contract proceeds of the SESB contract?

[81] The general rule is that an assignment shall be valid and remain in force until and unless the indebtedness is settled in full, or such assignment is terminated by the bank. It will be recalled that new arrangements arose by reason of the freezing of the first project account (with Maybank) by MACC. Vide the new arrangements all contract proceeds from the SESB contract were to be remitted into the second project account (the CIMB account). Swakaya entered into a new agreement with Petron on 15 November 2013 for the direct supply and delivery of the diesel fuel. However neither SESB nor the bank were privy to this arrangement.

[82] Petron's contention is that it enjoyed ownershp over the SESB contract proceeds paid into the second project account by reason of the agreement between Swakaya and Petron on 15 November 2013. It may well be the case that Swakaya held out to Petron or intended that the proceeds were to be utilised for the supply of petrol. But legally this is entirely inconsequential, given the existence of the absolute assignment which had transferred ownership of those contract proceeds in favour of the bank with effect from 3 April 2013.

[83] In short, Swakaya could not renege from, nor change its position because the right to those contract proceeds had been transferred completely to the bank as of 3 April 2013.

[84] The change as to where the monies were deposited did not, and could not, affect the bank's rights under the valid absolute assignment. A mere change of bank accounts did not, and could not, affect the absolute assignment which had been effected much earlier. The existing rights of the bank were therefore

in no way affected. The bank's right to the contract proceeds remained intact notwithstanding the freezing of the first project account and the opening of the second project account.

[85] In point of fact, since Swakaya had lost its rights and interest to the contract proceeds, it could not then resile from the absolute assignment by entering into a new agreement with Petron. This was contrary to and contravened the terms of the assignment of contract proceeds agreement it had executed with the bank. More importantly it did not have the effect of diverting funds to Petron because Swakaya had no legal entitlement to those contract proceeds.

[86] Swakaya also had no right to make any payment (the payment of RM26,027,121.95) to Petron from the second project account without the consent of the bank, which was legally entitled to the SESB contract proceeds. To approve or concede to such a preference in favour of Petron flouts established principles.

[87] As such, there was no basis for the trial judge to effectively 'extinguish' the rights of the bank as the lawful assignee under the absolute assignment and impose a constructive trust in favour of Petron for the sum of RM24,835,281.62 (part of the contract proceeds) sitting in the second project account simply by virtue of the new agreement between Petron and Swakaya dated November 2013, when the absolute assignment in favour of the bank was valid, subsisting and had the effect of assigning entitlement to the entirety of the contract proceeds in favour of the bank.

[88] We now move to consider the application of constructive trusts in a commercial arrangement such as the present, and whether such imposition is tenable in light of the existence of a legally valid and subsisting absolute assignment. This in turn warrants a consideration of the law relating to the subject.

THE LAW RELATING TO CONSTRUCTIVE TRUSTS

How does a constructive trust arise?

[89] The leading case authorities of *Takako Sakao* (which adopted the test in the *Paragon Finance and Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 2 Ch 276, p 300) and *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 (which relied on, among others, the cases of *Hussey v Palmer* [1972] 3 All ER 744 and *Westdeutsche Landesbank Girozentrale v*

Islington London Borough Council [1996] AC 669) have established that a constructive trust arises by operation of law when the circumstances are such that it would be unconscionable for the owner of the property in dispute to assert his own beneficial interest in the property and deny the beneficial interest of another. As comprehensively expressed in these cases, constructive trust is a remedial device that is imposed by equity to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties.

[90] And in *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457; [2016] 2 CLJ 7171 this court reiterated the statements above before going on to adopt the approach in *Twinsectra Ltd v Yardley And Others* [2002] 2 All ER 377. This saw the imposition of a two-fold test comprising both an objective and a subjective test. This test which requires compliance with the additional subjective honesty ingredient, was approved by this court in *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; [2014] 3 CLJ 1.

[91] Applied in the context of the present case, the imposition of a constructive trust could only arise by operation of law where the circumstances are such that it would be unconscionable for the bank to continue to assert a right to the contract proceeds under the SESB contract so as to deny a subsisting interest of Petron. Several issues immediately arise:

(a) Given that the bank enjoys a legal and valid subsisting absolute assignment over those contract proceeds can it be said that it is unconscionable for the bank to assert a right to the same, whether housed in project finance account one or two?

[92] The answer must be that it is not and cannot be unconscionable for the bank to rightfully seek to recover the monies in the second project finance account because entitlement to those monies (ie the chose in action) was transferred to the bank as of 3 April 2013. The fact that Petron had entered into a new contract with Swakaya in November 2013 makes no difference whatsoever as we have explored in some detail earlier. The issue of 'unconscionability' simply does not arise in the face of clear legal rights created under established principles which comprise the cornerstone of banking law.

[93] If a constructive trust were to applied in such circumstances, all security given by a borrower to a banking institution would be rendered nugatory or at the very least put in jeopardy by the possibility of a finding of a constructive trust by a third party claiming the same funds which comprise security for a loan. It would cast considerable uncertainty on the law of banking.

(b) Where is the evidence of dishonest conduct or dishonesty on the part of the bank which is the hallmark and basis for the imposition of a constructive trust?

[94] Again the answer must be that there is simply no such evidence. Dishonesty or less than honourable conduct, such as it is, can be attributed only to Swakaya. It was Swakaya that entered into a contract with Petron, inducing it to continue to supply diesel oil vide the new contract, without disclosing that the contract proceeds in the second project finance had already been absolutely assigned to the bank for the credit facilities it had been afforded. the bank was never made aware of this arrangement at the material time. Neither did SESB concur with any such arrangement, knowing that it would run foul of the absolute assignment which it had expressly consented to.

[95] It therefore bears repeating that there is simply no basis for the imposition of a constructive trust in the circumstances of this case.

[96] The facts of the instant appeal bear no relation to *Takako Sakao* where there was a dishonest appropriation of the innocent party's beneficial interest in the property which the wrong-doer sought to dishonestly appropriate the entirety of the property without acknowledging the innocent party's interest. At the risk of repetition, the bank here was never, nor is now seeking to appropriate Petron's 'interest' in the contract proceeds. This is because Petron has no 'interest', legal or beneficial in the proceeds. This in turn is by reason of the absolute assignment created prior in time (3 April 2013) whereby there was a transfer of the entitlement to proceeds deposited by SESB under the SESB contract, in favour of the bank.

[97] Petron's recourse is against Swakaya directly as it entered solely into a contract with Swakaya. Petron did not enter into any arrangement with the bank whereby the bank consented to Petron being paid out of the contract proceeds. As for SESB, even if it had knowledge of this new arrangement between Swakaya and Petron, it had no bearing whatsoever on the absolute assignment, by which SESB was bound to deposit contract proceeds into a project account (either 1 or 2) in favour of the bank.

[98] The contract between Swakaya and Petron does not create an equity giving Petron any interest in the contract proceeds. This is because Swakaya has no entitlement or right to create any such interest by reason of the absolute assignment in favour of the bank. Further, the contract between Swakaya and Petron merely creates, at best, a debt due and owing by Swakaya to Petron when it fails to pay for the diesel petrol supplies.

[99] There is therefore no basis for the imposition of a constructive trust. Petron can lay no claim to the subject matter of the alleged trust ie the contract proceeds because it has simply no interest, legal or beneficial in the same.

[100] It is also clear that a fundamental 'certainty' namely the subject matter of a trust is missing. There is no element of dishonesty, but on the contrary an absolute legal entitlement to the monies vis a vis the bank. There is therefore no basis for invoking the common law doctrine of a constructive trust.

[101] A perusal of the nature of a constructive trust in *Halsbury's Laws of England* (4th Ed) (which was relied upon by the Court of Appeal) bears out our conclusion that there is no basis for a constructive trust to arise. It is said to 'arise by operation of law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the propery. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealing with that fiduciary property that he acquired the specific property subject to the constructive trust'.

[102] As has been explained above, it would be completely contrary to the doctrine of constructive trust under the common law, as well as established principles of written law to conclude that the bank held the balance sum as a trustee in favour of Petron. How can it be *inequitable* for the bank to appropriate those monies, when it is entitled to do so under the law by reason of the subsistence of a valid, enforceable and binding legal assignment?

[103] Neither can it be said that the bank holds the monies for Petron in a fiduciary capacity. There is simply no relationship between the bank and Petron that would warrant such a relationship to be imputed. There is also a requirement that the bank should have dealt with the property in such a manner so as to effectively deprive Petron of its 'interest' or 'entitlement' to a part of the property.

[104] Again, as explained immediately above, this simply does not arise as the bank is dealing entirely in accordance with an absolute assignment in relation to the contract proceeds. And Petron has no interest in those proceeds. There can therefore be no question of a constructive trust arising. To this end the decision of both the courts below is necessarily flawed.

Burden of proof

[105] In this claim the burden continually remained on Petron as the plaintiff to establish that it enjoyed a claim superior to that of the bank in relation to the contract proceeds under the SESB contract, on a balance of probabilities.

[106] It is clear to us that Petron failed to discharge the burden on it, for the reasons cited above.

Entitlement to the balance sum

[107] Ultimately this claim centred on whether a creditor entitled to the recovery of a debt pursuant to a claim for monies for goods supplied can prevail over the holder of an absolute assignment. Petron is the creditor entitled to a debt due and owing by Swakaya to it, while the bank is the absolute assignee of the contract proceeds under the SESB contract (comprising the subject matter of this claim) as a consequence of Swakaya assigning those proceeds to it, as security for the grant of credit facilities of RM85m to Swakaya.

[108] There is no basis in law to support the proposition that Petron's mere claim for the recovery of a debt against Swakaya can possibly prevail against that of the bank, where the bank is the lawful assignee in law in relation to the subject matter of the suit here, namely the SESB contract proceeds. It is clear that the bank's claim which arose prior to any claim by Petron, prevails. Petron has no equity in those SESB contract proceeds.

CONCLUSION

[109] To summarise, the court takes the view that:

(a) the bank obtained and therefore enjoys a valid and enforceable absolute assignment which complies with s 4(3) of the Civil Law Act 1956;

(b) the effect of the absolute assignment under the law is to transfer the entitlement to the monies from the SESB contract proceeds ('the chose in action') held in either project account 1 or 2, in favour of the bank;

(c) the bank is and was, therefore at all material times, fully entitled to utilise the SESB contract proceeds in reducing the loan sums or credit facilities afforded by it to Swakaya;

(d) when the 'new arrangement' was made vide a contract between Swakaya and Petron in November 2013, this had no effect on the absolute assignment created by Swakaya in favour of the bank in April 2013 in respect of the grant of the credit facilities by the bank. In other words, the bank did not at any time lose its entitlement to the SESB contract proceeds by virtue of the absolute assignment which remained, and remains valid, binding and enforceable; and

(e) there is no basis whatsoever for the application of the common law doctrine of a constructive trust, nor to impose such a trust on the balance sum. Petron had no interest in the balance sum, be it legal or equitable. All Petron had was a right of recovery against Swakaya directly. The 'new arrangement' and Swakaya endorsing Petron's claim for the balance sum did not create any form of 'equity' in favour of Petron. The imposition of such a constructive trust was therefore erroneous.

Leave question

Whether the proprietary rights and interest of an assignee of a chose in action under a legal and absolute assignment could be defeated by a claim premised on 'trust' and/or 'constructive trust' by a third party who claimed to have a beneficial interest over the same chose in action.

Answer to Leave question

For these reasons, the answer to the leave question is in the negative.

[110] We are satisfied that the appeal has merits. We therefore allow the appeal, set aside the decision of the Court of Appeal and dismiss Petron's claim against the bank with costs of RM40,000 to be paid by Petron to the bank for the present appeal and costs of RM45,000 for the proceedings in the courts below. For avoidance of doubt, we order that the costs awarded to Petron in the sum of RM30,000 in the High Court and RM15,000 in the Court of Appeal, if already paid, be refunded to the bank.

[111] This judgement is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Ahmad Maarop has since retired. This is the judgment of the remaining members of the panel.

Leave question answered in the negative; appeal allowed; COA's decision set aside; and Petron's claim against the bank is dismissed.

Reported by Ashok Kumar